UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Mountaire Farms, Inc.,
Employer,

and Case No. 05-RD-256888

United Food & Commercial Workers Union,
Local 27,
Union,

and

Oscar Cruz Sosa,
Petitioner.

PETITIONER'S REPLY BRIEF

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Petitioner Oscar Cruz Sosa responds to the briefs of the other parties and amici, as permitted by the Board's revised scheduling order of September 16, 2020.

INTRODUCTION

The briefs of UFCW Local 27 ("Local 27") and its amici are more notable for what they omit than for what they argue. Specifically, no party or amici disputes the contract bar's utter absence from the text of the NLRA. No party or amici disputes that the contract bar strips from employees a statutory *right* the NLRA's text explicitly sets forth: the right to call for a decertification with *no time limits*—except within one year of a prior valid election. 29 U.S.C. § 159(c)(1) and (3). All parties and amici recognize that the contract bar was created in, and has evolved through, numerous case adjudications (not rulemakings), and no party or amici disputes the Board's right to reassess the contract bar when industrial conditions warrant. Even the three Congressmen from the Committee on Education and Labor concede that "the Board is not prohibited in all circumstances from considering the contract bar rule in its entirety," though they quibble that the "facts and procedural history of this case establish various insurmountable barriers." Congressional Brief at 15. Finally, no party or amici rebuts the many cases cited in Petitioner's Brief on the Merits at 12-26—which reveal that the contract bar and its byzantine, shifting, and unforgiving thirty-day "window periods" serve only to dispirit workers and prevent the elections to which they are statutorily entitled. Local 27 and its amici's silence on these issues is deafening.

As fully argued in Petitioner's Brief on the Merits, the Board, in reassessing the contract bar in 2020, is constrained only by its common sense and statutory mandate to protect the touchstone of the Act—employee free choice. *NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994) (citations & quotations omitted) ("The contract bar rule is not statutorily or judicially mandated, but is a creation of the Board. . . . Therefore, the Board has substantial discretion in deciding whether to apply the rule in a particular case and in formulating the contours of the rule.").[1] The Board should reject the arguments of those who discern deep meaning from congressional silence, or unearth "penumbras and emanations"[2] in the 1947 and 1959 labor law amendments to cement into stone a non-textual and arbitrary bar on employees' statutory *right* to conduct representation elections at a time of their own choosing. *See, e.g.*, Congressional Brief at 3-5; Higgins Brief at 6-7; AFL-CIO Brief at 5-8; SEIU Brief at 5. The contract bar's hoary age and alleged provenance should not save it in 2020.[3]

[1] The excellent and persuasive Brief of the Coalition for a Democratic Workplace *et al*. ("Business Amici") points out many examples of the Board reversing even decades-old precedents to more properly protect or effectuate the Act's key policies, or simply to return to prior policies that worked better. Brief of Business Amici at 13.

[2] *Griswold v. Conn.*, 381 U.S. 479, 484 (1965) (stating that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

[3] Several amici make hay about the contract bar's longevity. But an agency "need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one. It suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change adequately indicates." *FCC v. Fox Television Studios*, 556 U.S. 502, 515 (2009) (emphasis omitted).

The Board should also reject the arguments of those who believe the NLRA exists only to serve two parties—employers and unions—with employees being invisible. *See, e.g.*, LIUNA Mid-Atlantic Brief at 8-11; SEIU Brief at 17-20. To the contrary, employees like the Petitioner, Oscar Cruz Sosa, must be treated as full and independent parties in decertification cases, and in all NLRB proceedings. *See, e.g.*, Gen. Counsel Memo. 18-06, *Responding to Motions to Intervene by Decertification Petitioners and Employees* (Aug. 1, 2018); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("[T]he NLRA confers rights only on *employees,* not on unions or their nonemployee organizers.").

While unions may have gotten comfortable relying on the contract bar (and other non-statutory bars) to entrench themselves and to prevent their ouster (see cases cited in Petitioner's Brief on the Merits at 12-26), their reliance on a non-statutory bar cannot outweigh protecting employee free choice. Indeed, even courts that have upheld the contract bar have questioned or criticized it for trampling employee free choice. *See, e.g.*, *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 592-93 (2d Cir. 1961) (expressing "misgivings" about the contract bar, stating: "At first sight it seems . . . a far cry from the objectives of the Act that we should hold it an unfair labor practice for an employer to join an uncoerced majority of its employees in action they both want, when the only injured persons are the minority and an organization whose position depends on a suffrage it no longer possesses."); *NLRB v. Sanson Hosiery Mills, Inc.*, 195 F.2d 350, 352 (5th Cir. 1952) ("If the employees are being unlawfully denied the right to change their bargaining representative [by the contract bar], they have recourse to this Court by petition to review the Board's action."); *see also* General Counsel Brief at 6 ("[T]he very structure of the

contract bar doctrine lends itself to placing union institutional interests over the interests of the employees they represent—employees who have little control over the parties' bargaining strategy and whose rights are largely left in the trust of the Board.").

In short, overruling or limiting the contract bar serves the Act's primary goal of employee free choice because "[b]argaining representatives are thereby kept responsive to the needs and desires of their constituents; and employees dissatisfied with their representatives know that they will have the opportunity of changing them by peaceful means at an election conducted by an impartial Government agency." *Am. Seating Co.*, 106 NLRB 250, 255 (1953). It is high time the Board abolish the contract bar, so true employee free choice can reign.

ARGUMENT

I. There are no "procedural irregularities" that prevent the Board from reassessing the contract bar in this adjudicatory proceeding.

Local 27 and its amici have raised several procedural objections to the Board's decision to review the contract bar in this case. *See, e.g.*, Congressional Brief at 12-15; AFL-CIO Brief at 1; LIUNA Mid-Atlantic Brief at 5-6; Local 27 Brief on the Merits at 8-12. These objections are wrong.

First, Local 27 and certain amici argue that the Board impermissibly broadened the scope of the Request for Review by ordering briefing on the contract bar. The Board should recall that Local 27's Request for Review challenged the application of a longstanding exception to the contract bar under *Paragon Products Corp*., 134 NLRB 662 (1961). Petitioner, as a *defense* to that Request for Review, asked the Board to revisit the entire

contract bar if Local 27's Request for Review was granted. Petitioner raised this defense precisely because Local 27 argued that the contract bar applied to his petition and required its dismissal. Were Local 27 to prevail on even the "limited" question raised in its Request for Review, Petitioner's election could be barred and the already-cast ballots destroyed. There is nothing procedurally irregular about a party raising a defense and having the adjudicator decide that defense.

Second, Local 27 and others argue that reevaluation of the contract bar can only come through rulemaking. Local 27 Brief on the Merits at 8-10. However, the Board has neither created nor amended the contract bar through rulemaking. Without exception, every change in the contract bar policies discussed in the various briefs occurred through case adjudications. This case is no different, and claims that the Board cannot proceed through adjudication to decide the parties' claims and defenses are wrong.

The argument that notice and comment rulemaking are required to alter the contract bar defies decades of Supreme Court precedent and black-letter administrative law. As Local 27 admits in its Brief on the Merits at 9, it is "plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion." *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *see also Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007) ("Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication and accordingly agencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking.") (citations omitted); 32 Charles A. Wright & Arthur R. Miller, *Federal*

Practice and Procedure Judicial Review § 8123 (1st ed. 2020) (Westlaw database updated Oct. 2020) ("The law clearly establishes that an agency may choose to define the law or policy through adjudication even if it has rulemaking authority.").

Despite this clear precedent, Local 27 and its amici seek to reframe the Board's granting review to revisit the contract bar in this decertification case as an attempt to make a "rule" requiring notice and comment rulemaking. This reframing has no basis under current law. A rule "means the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." 5 U.S.C. § 551(4) (emphasis added); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring) (citing the APA definition). This language makes it clear that a "rule" requiring notice and comment rulemaking under the APA "is a statement that has legal consequences *only* for the future." *Bowen*, 488 U.S. at 217 (emphasis added). A "rulemaking" is defined as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). But as Petitioner pointed out previously, the Board's decision in this case will be applied to Local 27 and will most definitely affect Petitioner's rights. *See* Petitioner's Opposition to the Union's Motion for Reconsideration at 2-5 (July 16, 2020). The decision in this case will have an effect here and now, and not

only a "future effect."[4] Thus, the Board's adjudication here will not be making a "rule" requiring notice and comment rulemaking.

In essence, Local 27 and its amici are arguing that the Board should encrust additional procedural requirements—requirements not found in the APA—onto its discretionary choice whether to retain, modify, or abandon the contract bar through adjudication. The Board should reject this argument and protect employees' free choice by discarding the contract bar the same way it was created—through its lawful adjudicatory process.

II. Congress placed no contract bar in the text of the NLRA. That Congress allegedly "took note" of the contract bar in 1947 and 1959 establishes nothing.

Several of Local 27's amici argue that Congress approved of the contract bar, either explicitly or implicitly through its amendments to the NLRA in the 1947 Taft-Hartley Act and the 1959 Landrum-Griffin Act. These amici are wrong for several reasons.

First, certain amici represent that the contract bar was adopted by Congress through its subsequent enactments, specifically the 1959 Landrum-Griffin amendments to Section 8(f). *See, e.g.* Higgins Br. at 6; Congressional Brief at 5. Notably, these amici do not explicitly tie Section 8(f)'s text to the contract bar itself, and do not dispute the unequivocal fact that the contract bar is not found in NLRA's text—through amendment or otherwise.

Indeed, the Second Circuit opined that a literal reading of the NLRA could support an argument that "the Taft-Hartley amendment of [Section] 9(c) *outlawed* the contract bar."

[4] Of course any decision in this case will have precedential effect, and will therefore have some future effect. But a decision here will not have consequences *only* for the future. *See, e.g.*, *Caesars Ent.*, 368 NLRB No. 143, at *10-11 (Dec. 16, 2019).

Local 1545, United Bhd. of Carpenters & Joiners v. Vincent, 286 F.2d 127, 131 n.4 (2d Cir. 1960) (emphasis added). The Second Circuit recognized that legislative history—notably *not* the text of Section 8(f)—added context to Section 9(c), stating: "contract-bar policy was taken note of when Congress amended the National Labor Relations Act in 1947, . . . [but] the policy remains that of [the] Board and one [w]hich the Board in its discretion may apply or waive as the facts of a given case may demand in the interest of stability and fairness in collective bargaining agreements." *Id.* at 131 (citations & quotations omitted).

Section 8(f) provides, in pertinent part: "That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title." 29 U.S.C. § 158(f). Amici make much of the fact that the term "bar" appears in Section 8(f)'s text and conclude that this must refer to a contract bar. However, they ignore the simple fact that the NLRA has "bars" that specifically appear in the text of Sections 9(c) and 9(e)—the year-long election bars in both decertification (§159(c)) and deauthorization (§159(e)) cases. In context, Section 8(f)'s "bar" language and citation to Section 9(e) cannot refer to a contract bar, since Section 9(e) is the provision allowing union-represented employees to deauthorize the "union security" clause in their contract—something that *requires* a current contract, and therefore *per se* has no contract bar. *See, e.g.*, *L.A. Times Commc'ns LLC*, 357 NLRB 645 (2011) (contract language permitted the holding of a deauthorization election). Thus, the mere mention of the word

"bar" in Section 8(f) cannot by itself show that Congress *adopted* the contract bar by passing that Section.[5]

Second, certain amici argue that Congress did not specifically *prohibit* the contract bar in its subsequent amendments, so this "reflect[s] Congressional satisfaction with . . . the Board's contract-bar policy." Higgins Brief at 6-7; *see also* Congressional Brief at 3-5; AFL-CIO Brief at 5-8; SEIU Brief at 5. Arguments like this, invoking congressional acquiescence, have been described by the Ninth Circuit as "heroic" because "the standard for a judicial finding of congressional acquiescence is *extremely high*." *Nw. Env't Advocates v. EPA*, 537 F.3d 1006, 1022 (9th Cir. 2008) (emphasis added). In *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 169 n.5 (2001), the Supreme Court recognized that absent "overwhelming evidence of acquiescence [the Court is] loath to replace the plain and original understanding of a statute with an amended agency interpretation." *See also Rapanos v. United States*, 547 U.S. 715, 749 (2006); *Helvering v. Hallock*, 309 U.S. 106, 120 (1940) ("Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress,

[5] The amici may be asserting a novel argument based on the "prior construction" canon of statutory interpretation. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* at 318-19 (2012). Under the prior construction canon, "if courts have settled the meaning of an existing provision, the enactment of a new provision that mirrors the existing statutory text indicates, as a general matter, that the new provision has the same meaning." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017) (citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). That canon has no application here because no contract bar is found in the NLRA's text. Congress' use of the term "bar" in Section 8(f) cannot be considered to include a contract bar because there are no "words or phrases" enacting a contract bar in the NLRA's text that a court or agency could have previously construed. The term "bar" refers exclusively to the election bars in Section 9, and Section 8(f)'s text should be interpreted to be consistent with the remainder of the Act.

but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.").

In other words, since Congress has declined to amend NLRA Section 9 to specifically include the NLRB's contract bar policy, its silence is not evidence of adoption or even approval of that policy. It is the *rare* exception to find that Congress' silence means that it affirmatively acquiesced to a certain administrative policy. For example, in *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), the respondents argued that Congress acquiesced to an "aiding and abetting" interpretation of Section 10(b) of the 1934 Securities Exchange Act by its subsequent passage of amendments to the securities laws without specifically rejecting the "aiding and abetting" interpretation. The Supreme Court disagreed, stating "our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. It does not follow that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation." *Id.* at 186 (quotations & citations omitted).

Here, like in *Central Bank*, evidence of Congress' alleged "acquiescence" in the contract bar doctrine is decidedly underwhelming. The legislative history of the 1947 Amendments "is far from indicating a purpose to freeze the Board's handling of the [contract-bar] rule." *Local 1545, United Bhd. of Carpenters*, 286 F.2d at 131 n.4. Local 27's amici present little evidence other than to state that Congress "must have been well aware" of the contract bar, and there is no suggestion in legislative history that Congress

disapproved of it. Higgins Brief at 6; *see also* AFL-CIO Brief at 15. The Congressional Brief at 4-5 references a Senate Report that merely indicates that, as discussed above, Congress did not understand Section 9(c)'s literal reading to explicitly outlaw the contract bar. The AFL-CIO's Brief at 15 cites a single Board case, *Hexton Furniture Co*., 111 NLRB 342, 344 (1955), which incorrectly concluded that "contract-bar rules have become an established part of the law of labor relations," and "received the approval of Congress when it amended the Act in 1947, and have been 'as it were, written into the statute.'" But *Hexton Furniture* relied on *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), which itself merely "*assume[d]*" for the sake of argument that the contract bar was "written into the statute." *Id*. at 724 (emphasis added).[6] Thus, this is not the type of rare circumstance where overwhelming evidence compels a finding of congressional acquiescence, and the argument should be rejected. Even a lone court that incorrectly treated the contract bar as if it "were written into the statute," was forced to concede that the bar is a function of the

[6] In any event, the erroneous *Hexton Furniture* dicta has long since been disregarded by the Board and the courts. *See, e.g.*, *YWCA of W. Mass.*, 349 NLRB 762, 776 n.17 (2007) ("the contract-bar doctrine is not compelled by the Act or by judicial decision there under. It is an administrative device early adopted by the Board in the exercise of its discretion. . . "); *NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d at 683) (citations & quotations omitted) ("The contract bar rule is not statutorily or judicially mandated, but is a creation of the Board . . . ."); *NLRB v. Grace Co.*, 184 F.2d 126, 129 (8th Cir. 1950) (the contract bar "is a procedural rule which the Board in its discretion may apply or waive as the facts of a given case may demand in the interest of stability and fairness in collective bargaining agreements. The Board is not the slave of its rules."); *Ford Motor Co.*, 95 NLRB 932, 934 (1951) ("The contract bar rule is not compelled by the Act or by judicial decision thereunder. It is an administrative device early adopted by the Board in the exercise of its discretion as a means of maintaining stability of collective bargaining relationships."); *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 861 (1999) (contract bar is not statutorily mandated, but is an administrative device created by the Board, over which the Board has full discretion).

Board's discretion, not the statute itself. *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 362 F.2d 232, 236 (2d Cir. 1966).[7]

Third, Local 27's amici are asking the Board to interpret the NLRA in a way that limits its discretion to modify or abandon its own policy. In other words, amici effectively ask the Board to renounce some of its authority to deal with its own discretionary policies. Such an interpretation cannot be correct because "[i]t is a fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts. This principle applies not only to adding terms not found in the statute, but also to *imposing limits on an agency's discretion that are not supported by the text.*" *Little Sisters of the Poor Saints Peter & Paul Home v. Penn.*, 140 S. Ct. 2367, 2381 (2020) (quotations & citations omitted) (emphasis added). By introducing a limitation on the Board's authority not found in the statute, the amici are asking the Board to unilaterally "alter, rather than to interpret" the NLRA through a self-imposed construction of the Act with no textual support. *Id.*

In short, contrary to the views of Local 27's amici, Congress has not, explicitly or otherwise, made the contract bar a part of the NLRA—unlike its explicit establishment of a one-year election bar in the NLRA's text. *See* 29 U.S.C. § 159(c). Congress simply "took

[7] Several amici cite *NLRB v. Financial Institution Employees, Local No. 1182*, 475 U.S. 192 (1986) for the proposition that the Supreme Court approved of the contract bar rule and somehow enshrined it into the law. *See, e.g.*, Wisconsin School for Workers Brief at 3; AFL-CIO Brief at 11; Congressional Brief at 7. That grossly overstates the case. The Supreme Court in *Financial Institution Employees* was merely noting some of the Board's election doctrines, many of which the statute mandated. At no point did the Supreme Court state or even imply that the non-statutory contract bar was mandatory, necessary, or immutable.

note" of the contract bar, and the Board therefore remains free to alter or overrule that policy to enhance employees' statutory rights under NLRA Sections 7 and 9.

III. Industrial conditions have changed since 1962, and the contract bar should change with them.

As the excellent and persuasive Brief of the Business Amici points out, much has changed in the world of labor relations since the Board's 1962 decision in *General Cable Corp*., 139 NLRB 1123. For example, there no longer exists a "substantially unified stand of both labor and management" in support of a contract bar. *Id*. at 1125; Brief of Business Amici at 5-8. To the contrary, many employers, like Mountaire Farms, strongly and openly oppose an election bar that disrupts the workplace by saddling their employees with an unpopular representative.[8] *Silvan Indus.*, 367 NLRB No. 28 (Oct. 26, 2018); *Shaw's Supermarkets, Inc.*, 350 NLRB 585 (2007). The Briefs of the Business Amici and the U.S. Poultry & Egg Association *et al.* speak for a variety of employers in broad sectors of the economy, unionized and non-unionized, that do *not* support the current contract bar policy. Indeed, if the existence of the contract bar was as critical for unionized employers as amici like SEIU and AFL-CIO contend, one would expect the Nation's largest unionized employers—Ford, General Motors, AT&T, Kroger, Kaiser Permanente, Boeing, or United

[8] Although some of Local 27's amici speculate that curtailing the contract bar might encourage employers to foment decertifications and undercut their own bargaining obligations, *e.g.*, SEIU Brief at 21-22, there are *no* allegations of employer taint here, nor has Local 27 filed any ULP charges against Mountaire Farms alleging such taint. To the contrary, this is a case in which Petitioner and his fellow employees simply grew tired of Local 27's substandard contract and compulsory dues regime, which mandates either compelled union fees or discharge. *See, e.g.*, *United Nurses & Allied Pro. (Kent Hosp.)*, 367 NLRB No. 94 (Mar. 1, 2019), *enforced*, No. 19-1490, 2020 WL 5541150 (1st Cir. Sept. 15, 2020); *UFCW Local 27 (Mountaire Farms, Inc.)*, No. 05-CB-259415 (Petitioner filed a pending ULP charge against Local 27 to recoup the dues money seized pursuant to a facially unlawful union security clause).

Parcel Service, to name just a few—to have filed briefs supporting the bar.[9] But they have not.

Besides opposition from employers that did not exist when the Board decided *General Cable*, many other things have changed since 1962.

First, election petitions by rival unions are now exceedingly rare, which was not true in the 1950s when the AFL-CIO adopted "no raiding" provisions in Article XX-XXI of its Constitution (effectively cartelizing the unionized workforce). *See* General Counsel Brief at 3, 7; Samuel Estreicher, *Disunity Within the House of Labor: Change to Win or Stay the Course*, J. of Lab. Res., vol. 27, no. 4 (Fall 2006). Rather than being filed by rival unions, today's decertification petitions largely originate with disgruntled individual employees and their co-workers who no longer want union representation. In the modern world, rival unions are virtually nonexistent, and actual employees undertake the difficult task of organizing decertification elections only when they have a valid gripe against their representative and believe they can win—not to harass unions and create disharmony with

[9] With no apparent sense of irony, SEIU purports to speak for the League of Voluntary Hospitals and Homes, the Greater New York Nursing Home Association, and the Realty Advisory Board on Labor Relations when it argues how much *employers* value the contract bar. SEIU Brief at 17-20. First, it is telling that none of those large unionized employer associations filed their own briefs extolling the contract bar. Second, just as the courts and the Board are told to be suspicious of an employer acting as a "vindicator of its employees' organizational freedom," *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 790 (1996), such suspicion should be doubled when a doctrinaire political organization like SEIU purports to speak for employer interests. *Knox v. SEIU, Local 1000*, 567 U.S. 298, 304 (2012) (SEIU illegally raises employees' dues to build a "Political Fight–Back Fund"). The Briefs of Mountaire Farms, the Business Amici, and the U.S. Poultry & Egg Association *et al.* speak for employers' current interests in opposing the contract bar far more than SEIU. Finally, SEIU's brief in particular reads like it was filed by a "company union," since it seems much more concerned with protecting *employers'* interests in predictable and lower labor costs than in protecting the individual freedom of the employees it purports to represent. *See* Brief of U.S. Poultry & Egg Association at 7-9 (concerning the evils of "company unions").

ill-considered or futile petitions. Assertions to the contrary are purely speculative, *e.g.*, AFL-CIO Brief at 8-11, and no party or amici has cited any actual cases like that. The Brief of Josephine Smalls Miller shows that unions lose a majority of decertification elections, thus belying the notion that "harassment of the union" is the employees' motivating force. *Id*. at 13. And, as shown in Petitioner's Brief on the Merits, there has been no rash of "destabilizing" decertification elections in the later years of long term (e.g., five-year) contracts *just because* a bar does not exist for the latter two years. *See, e.g.*, Business Amici Brief at 11-12; *Coca-Cola Enters., Inc.*, 352 NLRB 1044 (2008) (describing long-term agreements); *Shaw's Supermarkets, Inc.*, 350 NLRB 585 (2007).

Second, Congress passed the Landrum-Griffin Act in 1959, and the *General Cable* Board in 1962 may have been waiting to see how that anti-corruption law affected workplace conditions. But Landrum-Griffin neither mandated nor approved of a contract bar of any length, *Dominick's Finer Foods*, 28 F.3d at 683, so the potential effect of Landrum-Griffin on labor stability no longer remains a concern.

Third, the 1962 Board was not in a position to see how future Boards might further restrict employee rights through enforcement of the contract bar's byzantine, shifting, and unforgiving thirty-day "window periods," which serve only to dispirit workers, prevent their requested elections, squash their statutory rights, and entrench incumbent unions.[10]

[10] The Brief of Amici Higgins at 10 asserts (emphasis added) that "Regional Office Information Officers are readily available to employees and/or rival unions who have any questions about filing petitions, and the Board has published forms 4645 and 5254 for use by the public and the Board staff to assure the contract-bar periods are *easily and quickly understood*." Mr. Higgins ignores the cases in which Information Officers gave employees erroneous information that doomed their petitions, *e.g., Forsythe Transportation, Inc.*, No. 05-RD-068230 (Order dated Dec. 1, 2011).

Petitioner's Brief on the Merits at 12-26; U.S. Poultry & Egg Association Brief at 14-15, 19-20 (detailing ways contract renewals can be rigged to make it difficult for employees to meet narrow thirty-day window periods). Unless the Board finds an exception to the contract bar in this case, or alters it, Oscar Cruz Sosa's decertification petition will be dismissed and hundreds of employees' ballots will be discarded. Destroying those ballots will not ensure workplace harmony and stability at Mountaire Farms, but it will ensure the obliteration of Mr. Cruz Sosa and his co-workers' Section 9 rights.

Fourth, some of Local 27's amici support the contract bar because it allegedly prevents employees from filing decertification petitions rashly, for ulterior or ill-considered reasons. *See, e.g.*, Brief of AFL-CIO at 8-11 (decertifications are filed when unions "refus[e] to indulge bargaining unit members' most extreme demands," or because of employees' "fickle nature" and "heat of the moment" passions). Such arguments not only denigrate employees' character and common sense, but also ignore the real and principled reasons most decertification efforts occur in today's world. When initiating a decertification petition, one consistent theme employees like Petitioner espouse is the lack of adequate representation and the requirement to pay compulsory union dues or face termination. Rather than rank speculation by some amici about employees' haste and caprice, a more

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Moreover, a search of the Board's website for "forms," https://www.nlrb.gov/guidance/fillable-forms, conducted on October 16, 2020 reveals no form 4645 or 5254, or any other comprehensive guidance on how to calculate the contract bar's shifting thirty-day window periods. Petitioner doubts many rank-and-file employees own or have ready access to "Brent [sic], Higgins, and Kadela, Editors in Chief., *How to Take a Case before the NLRB*, 9th ed., published by The Committee on Practice and Procedure under the NLRA, Section of Labor and Employment Law, American Bar Association and Bloomberg BNA (2016)," as cited in Higgins' Brief at 10 n.14.

plausible explanation for current decertification efforts could be employees' valid concerns about their union representation, or even anger at widespread union corruption, such as the indictment and guilty pleas of many top officials of the United Auto Workers. *15th UAW official pleads guilty in years-long corruption investigation,* https://www.abc12.com/2020/09/30/15th-uaw-official-pleads-guilty-in-years-long-corruption-investigation/ (last visited Oct. 13, 2020); *see also* https://uawd.org/about/ ("Unite All Workers for Democracy (UAWD) is a grassroots movement of UAW members united in the common goal of advocating for structural change within our union"); https://www.unionfacts.com/article/crime-and-corruption/(last visited Oct. 13, 2020) (databases of union officials' criminality).

The AFL-CIO's Brief at 9-10 invokes the specter of contentious bargaining and forty-day strikes in the auto industry to argue for the "industrial stability" that a three-year bar allegedly provides. But it never answers this crucial question: why should auto industry employees be stripped of their rights under NLRA Section 9, and saddled with UAW representation for up to three long years, once they learn that organization's leadership is wildly corrupt? Can anyone argue with a straight face that this Board's contract bar doctrine *enhances* industrial harmony and stability when it forces auto workers faced with sordid corruption to retain the UAW's "representation" for up to three more years because of an arbitrary bar? *See* General Counsel Brief at 7 ("The current bar's length of three years represents a somewhat arbitrary number . . . ."). Employees seeking to decertify a union under such conditions can hardly be termed "rash," "fickle," or "destabilizing," especially when they prevail a majority of the time. *See* Smalls Miller Brief at 13.

Fifth, certain amici argue that the Board's reevaluation of the contract bar in *General Cable* was in response to changes in workplace conditions, and that no party has identified such changes here. *E.g.*, Brief of AFL-CIO at 20; Higgins Brief at 5.[11] Nothing is further from the truth. The workplace changes driving *General Cable* have been superseded by unparalleled social, technological, and economic developments undreamed of in 1962. The dramatic workplace and economic changes since then make the Board's reconsideration of this doctrine in 2020 long overdue.

For one thing, employees today are much more mobile, and stay at jobs for much shorter periods of time. *See, e.g.*, Bureau of Lab. Stats' Nat'l Longitudinal Surveys, https://www.bls.gov/nls/home.htm#anch43 (showing that Americans born in the early 1980s hold an average of 8.2 jobs from ages 18 through 32, and that persons born in the latter years of the baby boom hold 12.3 jobs from ages 18 to 52); LinkedIn Blog, https://blog.linkedin.com/2016/04/12/will-this-year_s-college-grads-job-hop-more-than-previous-grads (discussing the increase in employee mobility in recent years). Given the increases in workers' mobility, it is not surprising that 94% of represented employees have never voted for the union that represents them, so unions enjoy often unchallenged and

[11] LIUNA Mid-Atlantic cites Board statistics to argue that a stable 40-year trend in the amount of decertification elections is "evidence that the three-year bar is not acting to suppress unmet employee desire . . . to decertify their unions . . . ." LIUNA Brief at 9-10. This argument ignores the material fact that these statistics reflect only decertification petitions that *made it to elections*. The contract bar requires automatic dismissal of petitions during the three-year period, so any petition impacted by the contract bar would *not* be reflected in the statistics LIUNA cites, making them wholly irrelevant to this discussion. Moreover, those statistics also fail to reflect petitions that were automatically dismissed based on other NLRB election bars, as well as "decertifications" that occurred via withdrawals of recognition under cases like *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019).

semi-permanent representational status.[12] Employees, especially those who have never voted, deserve a fresh look at the contract bar. The archaic grounds on which the Board previously relied to create and expand the bar should no longer be allowed to justify impinging on employees' statutory right to petition for changes in their representation.

Sixth and finally, what has changed since 1962 is a growing respect for employees' free choice and individual rights. In 1962, the Board exhibited little concern for *employees*' labor rights, apparently believing it existed to protect only two parties, unions and employers. *General Cable*, 139 NLRB at 1125. Many of Local 27's amici also appear to believe that employers and unions are the only actual "parties" in NLRB adjudications, *see, e.g.*, SEIU Brief at 4 (arguing the contract bar "benefit[s] labor and management alike"); Wisconsin School for Workers Brief at 3 (the contract bar was advocated for by "the overwhelming majority of labor and management representatives"). This perspective ignores the fact that employees are free and independent parties who deserve full protection

[12] *See* James Sherk, "Unelected Representatives: 94 percent of Union Members Never Voted for a Union," Heritage Found., Backgrounder No. 3126 (Aug. 30, 2016), http://www.heritage.org/research/reports/2016/08/unelected-representatives-94-percent-of-union-members-never-voted-for-a-union. The Brief of Professor Ruben J. Garcia *et al*. at 13 analogizes union elections to representative democracy and asserts that "it is a democracy's nature to undergo elections at regular intervals. Incumbent public officials—presidents, legislators, locally elected officials—are the subject of periodic elections. These elections are easily predictable." Professor Garcia appears to be advocating (perhaps unintentionally) for regular and periodic elections at the end of each contract or at some other predetermined time period. Petitioner agrees that unions, like politicians, should undergo *regular and periodic recertification elections*. However, that is not the state of the law. NLRA-covered unions are not automatically subjected to periodic elections like politicians, but instead enjoy virtually permanent incumbency. It is only when an employee affirmatively collects a petition signed by 30% of his co-workers and files it—subject to the byzantine rules and time restrictions created by the Board—that a union is subjected to a "democratic election" (*see* Petitioner's Brief on the Merits at 12-26). Given these hurdles, the contract bar should not stand as an additional and arbitrary hurdle for employees.

of their rights under the NLRA. *Lechmere*, 502 U.S. at 532; Gen. Counsel Memo. 18-06, *Responding to Motions to Intervene by Decertification Petitioners and Employees* (Aug. 1, 2018) (recognizing employees' right to be full parties).

In contrast with 1962, the Board and courts now recognize that the NLRA preeminently protects employees' rights to choose a union or refrain. *See, e.g.*, *Commc'ns Workers of Am. v. Beck*, 487 U.S. 735 (1988) (employees cannot be compelled to pay union dues for political and nonrepresentational activities); *Dana Corp.*, 351 NLRB 434 (2007) (employees have a right to a secret-ballot election after voluntary recognition); *Johnson Controls, Inc.*, 368 NLRB No. 20 (July 3, 2019) (incumbent union may file for a secret ballot election after employer lawfully withdraws recognition based on a majority showing); *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018) ("under [NLRA] Section 9(a), the rule is that the employees pick the union; the union does not pick the employees."); *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1158 (D.C. Cir. 2017) (citations omitted) ("bargaining order does not further the Act's policy of 'protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[.]' 29 U.S.C. § 151. To the contrary, it handcuffs Scomas's employees to the Union for no good record-based reason."); *see also Representation-Case Procedures*, 84 Fed. Reg. 69524 (Dec. 18, 2019); *Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships*, 85 Fed. Reg. 18366 (April 1, 2020).

In short, the Board today protects employees' right to refrain more jealously than it did in 1962. The legal landscape and many working conditions have changed since 1962, and

the contract bar must change with them. The Board should be making it easier, not harder, for employees to subject their union representative to the periodic will of the voters.[13]

IV. The length of a contract should not determine employees' statutory rights.

At one point many decades ago the Board looked to "industry standards" to determine the length of the contract bar, and even approved of five-year contract bars based on those industry standards. *Gen. Motors Corp.*, 102 NLRB 1140, 1143 (1953). Eventually the Board abandoned the search for industry standards and applied across-the-board, but arbitrary, contract bar timelines. *Pac. Coast Ass'n of Pulp & Paper Mfrs.*, 121 NLRB 990 (1958); General Counsel Brief at 3-6.

Many amici now argue that a change in the contract bar policy will cause widespread industrial instability and uncertainty in collective bargaining. *See, e.g.*, Higgins Brief at 5; LIUNA Brief at 7; Wisconsin School for Workers Brief at 3; *see generally* AFL-CIO Brief. But this argument reveals the inherent unfairness and arbitrariness of the contract bar—and the motivations of negotiating unions—because it shows that contract lengths are often determined not by what is good for the parties or the bargaining unit employees, but rather

[13] The General Counsel supports the current three-year contract bar as long as abuse-prone "blocking charges," which can further delay elections beyond three years, are eliminated. "The Board's current blocking charge rule ameliorates this problem by allowing the direction of an election notwithstanding the filing of a blocking charge. Thus, to the extent that the current blocking charge rule remains in effect, the three-year contract bar need not be rescinded as it would not unduly impact employee free choice." General Counsel Brief at 8. Petitioner respectfully disagrees in part. Petitioner salutes the Board for eliminating blocking charges and allowing elections to go forward and ballots counted in most cases. However, even with those laudatory amendments to the Board's elections processes, there is no reason to curtail for three long years employees' statutory *right* under NLRA Section 9 to call for an election at a time of their own choosing. Contrary to the General Counsel, saddling employees with an unpopular union for three years causes a severe and "undue" impact on employee free choice.

is based on a union's ability to prevent employees from decertifying it. *See* General Counsel Brief at 6 (recognizing that "the very structure of the contract bar doctrine lends itself to placing union institutional interests over the interests of the employees they represent—employees who have little control over the parties' bargaining strategy and whose rights are largely left in the trust of the Board."). The current contract bar distorts the process by which parties establish contract lengths, and abolishing the contract bar will not prevent employers and unions from entering into long-term contracts they deem advantageous for the bargaining unit employees, especially if they find annual or biennial bargaining too cumbersome. *See* LIUNA Mid-Atlantic Brief at 7. Petitioner's suggestion to eliminate the contract bar would not prevent contracts of any length. It would simply permit employees to seek decertification under Section 9 at a time of their own choosing.

The exhibits to amici Smalls Miller's Brief demonstrate that many employers and unions have long term contracts. While 42% of the analyzed contracts since 1993 were of three-year duration, a majority—58%—were not. These exhibits show that many contracts, on the order of 33%, ran from 4-10 years—with no contract bar protection during the outlying years and no deleterious effects on labor stability. *Shaw's Supermarkets*, 350 NLRB 585. Thus, long contracts per se are not the problem; prematurely forbidding employees to exercise their statutory rights under Section 9 based on arbitrary timelines is.

Finally, Local 27 and its amici ignore unions' unfettered ability to disclaim representation and walk away from a bargaining unit and a contract at any time, no matter the contract's length. *Garden Manor Farms, Inc.*, 341 NLRB 192 (2004) (giving effect to a disclaimer made pursuant to a "no-raiding" agreement); *VFL Tech. Corp.*, 332 NLRB

1443 (2000) ("a contract does not bar an election when the contracting union has validly disclaimed interest in representing the employees covered by the agreement."); *Am. Sunroof,* 243 NLRB 1128 (1979). How is industrial stability enhanced when unions can unilaterally walk away, in mid-contract, from a bargaining unit it no longer wants to represent, but employees are forbidden by an arbitrary contract bar rule from doing the equivalent when *they* no longer desire representation?

In sum, contract length should turn on the union's ability to help the unit employees it purports to represent, not to "game the system" and trap them in represented bargaining units for as long as possible and to prevent them from decertifying. The fact that many of Local 27's amici argue that changes in the contract bar will change the length of contracts is extremely telling about unions' true agenda. *See* General Counsel Brief at 6. In sharp contrast, the Business Amici Brief argues persuasively at 11-12 that a contract bar is *not* needed to insure labor stability for any length of time.

V. The Board should make significant adjustments to the contract bar if it opts to keep it for any duration.

Mountaire Farms and the Business Amici advocate that certain contracts should not be of "bar quality" because their provisions coerce employees in their choice to refrain from supporting the union. As examples, Mountaire Farms cites contracts with "union security" clauses and contracts that violate employee rights under cases like *Beck*, 487 U.S. 735. Mountaire Farms' Brief on the Merits at 16-18; *see also* Business Amici Brief at 14-16. They also argue that major changes in union structure, such as union affiliation switches, *NLRB v. Financial Institution Employees, Local No. 1182*, 475 U.S. 192 (1986), should

cause a contract to lose its bar quality. Petitioner agrees with these arguments and believes the Board should adopt strict limitations on the contract bar *if* it insists on maintaining such a bar for any length of time.

The General Counsel argues that if the Board retains a contract bar the window periods to file decertifications should be tripled, to ninety-days. General Counsel Brief at 9-12; *see also* Business Amici at 15. Although Petitioner's Brief on the Merits called for different and larger window periods if any contract bar is retained, Petitioner certainly supports all efforts to create longer and clearer window periods *if* the Board chooses to retain them at all. This is only fair given the demonstrated problems employees have in threading the needle and meeting short thirty-day window periods. See Petitioner's Brief on the Merits at 12-26. Petitioner also does not believe any sixty-day insulated periods are necessary, because these "open then close then open again" window periods simply create trap doors for unwary and unschooled employees to lock them into union representation.

VI. Whether the Board eliminates or amends the contract bar, it should apply that decision retroactively.

One amici suggests that if the Board eliminates or amends the contract bar, it should not apply that decision retroactively because unions and employers have relied on the bar. Brief of Professor Garcia. The Board should reject this suggestion.

First, as noted, there is simply no statutory basis for the contract bar. Indeed, there is a strong argument to be made that the Board has a duty to abandon the contract bar because it has no basis in the NLRA's text. And "reliance interests are irrelevant when assessing whether to rescind an action that the agency lacked statuary authority to take." *Dep't of*

Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1930 (2020) (Thomas, J., dissenting). "No amount of reliance could ever justify continuing" a policy that "neither Congress nor the Constitution" gave an agency the power to adopt. *Id.*

Second, and even more to the point, if the Board abandons or modifies the contract bar, it would work a manifest injustice against Petitioner and his fellow employees' Sections 7 and 9 rights if that decision is not applied to them. *See Caesars Ent.*, 368 NLRB No. 143, at 11 (Dec. 16, 2019) ("[F]ailing to apply our new standard retroactively would produce a result which is contrary to a statutory design or to legal and equitable principles." (citations & quotations omitted)). A decision here that is not applied directly to this case could mean hundreds of already-cast ballots will have to be destroyed and never counted, something that is inimical to Petitioner's rights and to democracy in the workplace.

CONCLUSION

As discussed in this Brief and in Petitioner's Brief on the Merits, the Board should return to its original and proper understanding of the Act—that a contract bar tramples on employees' statutory rights and is neither necessary nor permitted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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